



OFFICE OF THE ELECTION OFFICER
% INTERNATIONAL BROTHERHOOD OF TEAMSTERS
25 Louisiana Avenue, NW
Washington, DC 20001

Michael H. Holland
Election Officer

(202) 624-8778
1-800-828-6496
Fax (202) 624-8792

October 23, 1991

VIA UPS OVERNIGHT

Tom Sever
c/o IBT Local Union 30
720 Lowry Avenue
Jeannette, PA 15644

Gene Giacumbo
c/o IBT Local Union 843
446 Morris Avenue
Springfield, NJ 07081

Mario Perrucci
c/o IBT Local Union 177
282 Hillside Avenue
Hillside, NJ 07205

Stroh's Brewery
Attn: David Lichtel
Routes 78 & 100
Fogelsville, PA 18051

Re: Election Office Case No. P-947-IBT

Gentlemen:

A protest was filed pursuant to the *Rules for the IBT International Union Delegate and Officer Election*, revised August 1, 1990 ("Rules") by Tom Sever, Mario Perrucci and Gene Giacumbo, all candidates for International Union officer positions on the Ron Carey Slate. The protestors allege that on October 2, 1991, they were denied access to the Stroh's Brewery facility located in Fogelsville, Pennsylvania for the purpose of campaigning.

None of the protestors are employed by Stroh's. The Stroh's Brewery plant located in Fogelsville does however employ approximately 425 IBT members represented by Local Union 12.¹ At approximately 10:30 a.m. on October 2, 1991, Mr. Giacumbo contacted David Lichtel, a management representative of Stroh's Brewery, concerning the intention of Mr. Giacumbo, Mr. Sever and Mr. Perrucci to visit the plant for the purpose of campaigning. Mr. Lichtel requested that Mr. Giacumbo call back at 11:30 a.m. Mr. Giacumbo did so and was advised by Mr. Lichtel that any attempt to leaflet or campaign at the plant gate would result in their being escorted off company property.

¹The entire membership of Local 12 are employed at Fogelville Stroh's plant.

Nevertheless, Messrs. Sever, Perrucci and Giacumbo arrived at the plant gate at about 3:00 p.m., during the period of a shift change. They were asked to leave the property by the chief of plant security for the company. He recommended that the candidates distribute their literature at or near the public intersection leading into the plant. The candidates left the premises, but questioning the safety of campaigning at the alternate recommended situs did not attempt to campaign on the public highway.

Union members have a right protected by the National Labor Relations Act, and thus by Article VIII, §10(d) of the *Rules*, to engage in communications, solicitations and the like with respect to intra-union affairs including intra-union elections. District Lodge 91, International Association of Machinists v. NLRB, 814 F. 2nd 876 (2nd Cir., 1987); NLRB v Methodist Hospitals, Gary, Inc., 732 F. 2nd 43 (7th Cir., 1984); ABF Freight Systems v NLRB, 673 F. 2nd 229 (8th Cir., 1982). The right to engage in such communications includes the right to access to an employer's property, under certain circumstances, by labor union members who are of not employees of that employer.

Where denial of all access to the property of an employer would prevent effective communications with such employer's employees by members not so employed, the employer's private property rights must accommodate the right to engage in such communication-type activities. Jean Country, 291 NLRB No. 4 (1988). Since the substantive federal right to engage in communication and solicitation includes the right to engage in such communication and solicitations with respect to intra-union election activities, the employer's rights to private property must accommodate the right to engage in such campaign activities. Since the right is an existing right under substantive federal law, it is protected under Article VIII, § 10(d) of the *Rules*.

Property that is purely public cannot be controlled by the employer, who cannot interfere with protected activity including campaigning activities on such property. Lechmere v. NLRB, 914 F.2d 313 (1st Cir., 1990). An employer's rights with respect to property which is technically private, but open to the public, such as shopping malls, access roads and parking lots, are normally insufficient to overrule the right of access by non-employees. Where the employer has traditionally permitted non-employees to engage in solicitation, even if other than union solicitation, on its property, such practices demonstrate that the private property interest is insufficient to override access rights for union activities, including intra-union election activities, and access to union members other than employees must be afforded. Even where the employer has restricted its property to access by its employees only, such rights cannot outweigh the rights of non-employees to have access to the property if no effective alternative means of communication exist. Lechmere v. NLRB, supra; Trident Seafoods Corp., 293 NLRB 125 (1989). The alternate means must be reasonable, not overly costly or time-consuming and must generally permit face-to-face communications. National Maritime Union v. NLRB, 867 F.2nd 767 (2nd Cir., 1989).

Thus, in the instant case, Stroh's property interest must yield to a limited right of access for IBT members not employed by Stroh's, if denying such access would prevent effective communications between IBT members not employed by Stroh's and those so employed. Regional Coordinator Peter Marks personally visited the Stroh's site in Fogelsville.

Stroh's Brewery at Fogelsville is a multi-acre facility. ~~Entry to the facility is~~ from a wide two-lane private access road ~~approximately one-half mile in length~~. The access road intersects with a four-lane highway posted for travel at 55 miles per hour. A guard shack, which is manned 24 hours a day is located on the access road. There is a gate at the guard shack which is similar to a railroad crossing gate; there are also stop signs at this point on the access road. ~~During the periods when the shifts are~~ changing, the gate is left up and the stop signs disregarded to enable traffic to move without stopping. The traffic on the access road during shift change is heavy and moves at a relatively high rate of speed.

After passing the guard shack, employees enter a large parking lot with approximately 200 slots. There is one employee entrance into the plant where IBT members work. Located directly adjacent to this entry is a large glass-enclosed entrance to the office or administration building.

The Election Officer determines that candidates and members wishing to campaign at the Stroh's Brewery have no reasonable means of access to IBT members employed at Stroh's without entry onto the employer's property. The high volume and speed of traffic at the intersection with the public highway makes campaigning at that location totally impractical.

Access to the Stroh's private road also would not afford IBT members the rights provided by Article VIII, §10(d) of the *Rules*. ~~Employees travel this road at a relatively~~ high rate of speed with no required stopping or slowing prior to entering the parking lot. ~~Campaigning on the roadway would be both impractical and unsafe~~. Other than the employee parking lot, there is no safe location where IBT members not employed by Stroh's can obtain contact for campaign purposes with IBT members employed at the Fogelsville plant. Therefore, the Election Officer determines that Stroh's Brewery must allow IBT members not employed by Stroh's access to its parking lot for the purpose of campaigning.

The protest is GRANTED. Stroh's Brewery is directed to allow IBT members not employed by it entrance into its parking lot for the purpose of campaigning. Such members shall announce their presence and purpose to the security officer located at the guard shack and provide, if requested, identification. Stroh's may limit access in the parking lot to the area immediately adjacent to the plant entrance, provided all IBT members are treated equally.

Tom Sever
Page 4

If any interested party is not satisfied with this determination, they may request a hearing before the Independent Administrator within twenty-four (24) hours of their receipt of this letter. The parties are reminded that, absent extraordinary circumstances, no party may rely upon evidence that was not presented to the Office of the Election Officer in any such appeal. Requests for a hearing shall be made in writing, and shall be served on Independent Administrator Frederick B. Lacey at LeBoeuf, Lamb, Leiby & MacRae, One Gateway Center, Newark, New Jersey 07102-5311, Facsimile (201) 622-6693. Copies of the request for hearing must be served on the parties listed above, as well as upon the Election Officer, IBT, 25 Louisiana Avenue, N.W., Washington, D.C. 20001, Facsimile (202) 624-8792. A copy of the protest must accompany the request for a hearing.

Very truly yours,



Michael H. Holland

MHH/ca

cc: Frederick B. Lacey, Independent Administrator

Peter V. Marks, Sr., Regional Coordinator

MHH/cb

IN RE:

TOM SEVER,
MARIO PERRUCCI
GENE GIACUMBO

and

STROH BREWERY COMPANY

91 - Elec. App. - 219 (SA)

DECISION OF THE
INDEPENDENT ADMINISTRATOR

This matter arises as an appeal of the Election Officer's decision in Case No. P-947-IBT. A hearing was held before me by way of teleconference at which the following persons were heard: John J. Sullivan and Barbara Hillman for the Election Officer; Peter Marks, a Regional Coordinator; and Robert Veracruz and Ron Holloway for the Stroh Brewery Company ("Stroh"). In addition, the Election Officer submitted a written Summary in accordance with Article XI, Section 1.a.(7) of the Rules For The IBT International Union Delegate And Officer Election (the "Election Rules").

This is another in a long line of campaign access cases in which a non-employee IBT member seeks access to an employer's property for campaign purposes. In this case, Tom Sever, Mario Perrucci, and Gene Giacumbo, candidates for IBT International Union officer positions, were denied access when they sought to campaign in the employee parking lot at the Stroh plant in Fogelsville, Pennsylvania on October 2, 1991. They subsequently filed a protest with the Election Officer asserting that access was required

because there was no other reasonable means of contacting IBT members employed at the plant.

Upon investigation, the Election Officer determined that a limited right of access was necessary to effectuate the rights under the Election Rules of non-employee IBT members who wished to campaign at the plant. To this end, the Election Officer directed Stroh to permit non-employee IBT members who wished to campaign at the Fogelsville facility to use a portion of the employee parking lot for such purposes.

Stroh's initial response to this decision was to inform the Election Officer, by letter dated October 24, 1991, that it disagreed with the decision and would not comply. However, by letter dated October 25, 1991, the Election Officer advised Stroh that non-compliance with a decision that was not appealed, or with a decision that was affirmed upon appeal by the Independent Administrator, would constitute contempt of court. The Election Officer forwarded a copy of that letter to the United States Attorney for the Southern District of New York in anticipation of a request to institute contempt proceedings. On October 28, 1991, Stroh advised that its October 24th letter had been an appeal of the Election Officer's decision. This matter was thus accepted as a timely appeal of the decision in question.

As a preliminary matter, Stroh objects to the jurisdiction of the Court-appointed officers. However, it is now well settled that the Election Officer and the Independent Administrator have jurisdiction over employers to bind them to remedial orders issued

6-91 WED 11:18 AM
under the Election Rules. As stated by the Election Officer in his Summary:

Regarding Stroh's threshold claim of lack of jurisdiction, the Independent Administrator has already had occasion to address the issue of jurisdiction of the Court-appointed officers over employers of IBT members engaged in the election process governed by the Consent Order of March 14, 1989. In In re Robert McGinnis and IBT Local Union 710, Yellow Freight Systems, Inc., 91-Elec. App. -43 (January 23, 1991), the Independent Administrator emphasized that "a union member's right to engage in campaign activity at the work place is crucial" to enforcement of the Consent Order. Id. at 12. He further noted that employers "have the power, if not restrained, to subvert the electoral process and thereby eviscerate the most critical provisions of the Consent Order by preventing IBT members from exercising their right to campaign for delegate or officer candidates." Id. at 5-6. In sum, the Independent Administrator recognized that:

The implementation of the Consent Order, and its mandate for fair, honest and open elections, is vulnerable to frustration or disruption by employers If the Consent Order is to have meaning, the Court-appointed officers must have the power to exercise jurisdiction over [employers] and I conclude that we do. Id. at 10.

Consequently, the Independent Administrator found in Yellow Freight that the Election Rules properly provide for jurisdiction over employers in order to enforce the Consent Order. Id. at 6.

The decision of the Independent Administrator as to jurisdiction over employers was affirmed by the Federal District Court. United States v. IBT, No. 88 Civ 4486 (DNE) (S.D.N.Y. Apr. 3, 1991), aff'd, United States v. IBT, No. 91-6096 (2d Cir. October 29, 1991) (vacating and remanding on other grounds). The Court of Appeals agreed that jurisdiction over employers of IBT members involved in the election was "necessary or appropriate" to the implementation of the Consent Decree. Id. at 14.

6-91 WED 11:10 AM

For the same reasons as set forth in Yellow Freight, the Court-appointed officers have jurisdiction over Stroh to the extent necessary to enforce the Consent Order and the Election Rules promulgated thereunder.

In addition, the Election Officer properly considered Stroh's due process arguments:

In his request for hearing, counsel for Stroh objects that the Election Officer has engaged in an unconstitutional taking of property without due process in violation of the Fifth Amendment because Stroh has not heretofore been a party to these proceedings. As a factual matter, this aspect of the protest may be denied on the basis of Stroh's participation in these proceedings through its Corporate Industrial Relations Manager, Ronald X. Holloway, and subsequently its counsel. As a substantive legal matter, the Federal District Court overseeing the Consent Decree has had occasion to rule that the action of the Court-appointed officers does not constitute state action for purposes of a due process claim because they are determining rights arising from an essentially private agreement. United States v. IBT, No. 88 Civ 4486 (DNE), Opinion and Order at 14 (S.D.N.Y. October 29, 1991) citing United States v. IBT, No. 91-6052, slip op. at 6769, 6775-76 (2d. Cir. August 6, 1991). That reasoning applies equally to Stroh's claim under the Fifth Amendment. Finally, both the Federal District Court and the Court of Appeals for the Second Circuit have determined that the procedures established under the Election Rules and followed by the Election Officer and Independent Administrator fully provide due process to those involved in the election process. United States v. IBT, No. 91-6096 slip op. at 16-17 (2d Cir. October 29, 1991), ("It is difficult to imagine additional or different procedures that would accord [an employer] a significantly enhanced opportunity to present its positions concerning this controversy"); United States v. IBT, No. 88 Civ 4486, Opinion and Order at 14 (S.D.N.Y. October 29, 1991) (parties in election process provided due process).

Thus it is clear that the Election Officer and Independent Administrator have the jurisdiction necessary to decide the merits of this controversy and that the procedures followed provide Stroh

6-91 MED 11117 11117 11117

with adequate Constitutional protection even assuming that the Court-appointed officers would be considered state actors.

The merits of the controversy must be resolved by an application of Article VII, Section 10.d. of the Election Rules which provides that no restrictions shall be placed on an IBT member's pre-existing rights to campaign on an employer's premises. As previously stated by the Election Officer in In Re: Frechin, Election Office Case No. P-852-LU174-PNW, aff'd, 91 - Elec. App. - 195 (SA) (October 4, 1991):

Pre-existing rights can be established by federal substantive law or by the past practice of a particular employer. The National Labor Relations Act, 29 U.S.C. § 158(a)(1), protects the right of union members to engage in communications, solicitations and the like with respect to intra-union affairs, including intra-union elections. District Lodge 91, International Association of Machinists v. NLRB, 814 F.2d 876 (2d Cir. 1987); NLRB v. Methodist Hospital of Gary, Inc., 732 F.2d 43 (7th Cir. 1984); ABF Freight Systems v. NLRB, 673 F.2d 229 (8th Cir. 1982). And the pre-existing rights provided by federal substantive law include the right to reasonable access to their fellow union members working for another employer. National Maritime Union v. NLRB, 867 F.2d 767 (2d Cir. 1989). Accordingly, the Election Rules incorporate these pre-existing rights.

In an Advisory Regarding Political Rights issued on December 28, 1990, the Election Officer affirmed, inter alia, that federal labor law gives IBT members who are not employees a right to campaign among their fellow IBT members. However, the Advisory also clarifies that this right is more limited than the right to campaign at one's own place of work.

Reasonable access may be available to non-employees on public property in the vicinity of the work site, and plainly, an employer cannot interfere with protected activity, including campaign activity, on such property. Lechmere v. NLRB, 914 F.2d 313 (1st Cir. 1990), cert. granted, 111 S.Ct. 1305 (1991). However, "reasonable" access implies that the alternative means not on the

employer's property is not unduly costly, burdensome or unsafe, and generally permits face-to-face contact. E.g., National Maritime Union, 867 F.2d 767 (2d Cir. 1989). Accordingly, if IBT members are not able to safely or effectively communicate with their fellow members from public property, limited intrusion by IBT members onto the employer's private property may be required. Jean Country, 291 NLRB No. 4 (1988).

Since there is no relevant past practice, the resolution of this access issue requires use of a balancing test in which the IBT members' right to engage in campaign activity is weighed against the employer's property right and the availability of a reasonable alternative means of communication. This in turn calls for a fact laden inquiry into the physical details of the employer's worksite layout and location.

The facility in question here employs about 425 IBT members. The parking lot is located in front of the plant and is set back about 300 yards from a four-lane highway. The lot is accessed by a paved two-lane road that runs through a grassy area also owned by Stroh. There is a security checkpoint located at the entrance to the parking lot where there is also a stop sign and a railroad-type gate that can be raised or lowered by the guard on duty. At shift changes, the gate is kept in the up position and the stop sign is not enforced. During the shift change, the cars, traveling at speeds of 25 m.p.h. and up, are waived in or out as the case may be.

The Election Officer physically inspected the job site and met with Stroh representatives to determine how IBT members could engage in meaningful campaign activity and at the same time respect

6-91 WED 17:28 INDEPENDENT NEWS

Stroh's property rights and interest in privacy and security. The Election Officer rejected proposals that required members to stand at the intersection of the access road and highway or along the access road in front of the checkpoint as unsafe, as creating congestion and traffic hazards, and as not conducive to meaningful contact.

In addition, the Election Officer evaluated the possibility of offsite alternatives. However, it should be obvious that home visits, telephone solicitations, and mailings are not reasonable alternatives under these circumstances. Given that balloting for the election will begin on November 7th, home visits to 450 employees before that date would be impossible. Telephone solicitations and mailings are also costly and do not permit the face-to-face contact favored by the Election Rules and sought by the complainants here. These alternatives are costly, not equivalent to the rights sought, and unduly burdensome.

After balancing the rights at issue, and considering the alternatives, the Election Officer concluded that non-employee IBT members were owed a limited right of access to Stroh's employee parking lot. To accommodate Stroh's property rights and interest in security, the Election Officer directed that IBT members interested in campaigning at Stroh announce their presence and purpose to the security personnel and provide identification, if requested to do so. The Election Officer also advised that Stroh could limit access to the area immediately adjacent to the employee

entrance to the plant and could have the campaigners wear proper identification issued by Stroh.

At the hearing before me, Stroh focused its presentation on jurisdictional and Constitutional issues. These arguments have already been dismissed. In addition, however, Stroh did assert that it had an enhanced security interest arising out of its involvement with taxable alcohol. It is evident that the Election Officer gave considerable deference to Stroh's security interest in making his decision. As noted, the campaigners must report to the security personnel, can be limited to a fixed portion of the parking lot and can be required to wear proper identification.

Stroh also suggested that if the speed of the cars became a problem, it could force the cars to leave the lot at shift changes one at a time. This suggestion is clearly disingenuous as Stroh itself recognized that, by doing so, it would create congestion and "a bunch of angry Teamsters."

In sum, at the hearing before me, Stroh presented little by way of argument that was relevant to the Election Officer's analysis of the merits of this case and nothing that showed his conclusion was erroneous.

For the foregoing reasons, the decision of the Election Officer is affirmed in all respects.

As a final note, at the hearing before me, Stroh indicated a further unwillingness to accept anything other than a reversal of the Election Officer's decision. Specifically, Stroh suggested it

would litgate any adverse decision before the "Third Circuit" rather than comply. With this in mind, a copy of this decision is being furnished to the United States Attorney for the Southern District of New York for whatever compliance action he may deem appropriate.

Stuart Alderoty 12/1

Frederick B. Lacey
Independent Administrator
By: Stuart Alderoty, Designee

Dated: November 6, 1991